Peter Callaghan: McCleary court just wants state to do as promised

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In her majority opinion in McCleary v. State of Washington, state Supreme Court Justice Debra Stephens knew she was wading into unfamiliar waters.

As most are aware, the unanimous court said in January 2012 that the state has been violating its constitution for decades. Rather than making public education its paramount duty and funding it amply, the state had shifted the burden to unreliable and unequal local school levies.

Few were surprised at the court's conclusion. What raised eyebrows was that the court would retain jurisdiction to make sure lawmakers complied by 2018. Many objected to this apparent disrespect for the separation of powers. Some even objected out loud.

Since everyone quotes McCleary for their purposes — using what they claim it says to support whatever they already believe — I'll quote the actual words to show why the court made a good case for staying involved.

Stephens acknowledged that the McCleary remedy might seem shocking since the court doesn't retain jurisdiction when it finds that the state has violated other important rights, such as the freedoms of religion or speech.

"With respect to those rights, the role of the court is to police the outer limits of government power …" she wrote. But in determining whether the state is fulfilling its paramount duty "the court is concerned not with whether the state has done too much, but whether it has done enough. Positive constitutional rights do not restrain government action, they require it."

That is why cases involving the paramount duty clause of the state constitution have always proved difficult, she noted.

"If nothing else, they test the limits of judicial restraint and discretion by requiring the court to take a more active stance in ensuring the state complies with its affirmative constitutional duty," Stephens wrote. Besides, the court took a hands-off approach in the 1970s when it found the state in violation of the constitution in a nearly identical case, and that didn't work out very well.

Stephens acknowledged the different responsibilities — and skills — of the two branches of government when she relied on the Legislature's definition of basic education and the Legislature's plan for providing it.

"The Legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms," Stephens wrote. "We defer to the Legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the state's plan to fully implement education reform by 2018."

That was two years ago. And what had been somewhat muffled complaints by lawmakers grew louder this month when the court released its latest response to the Legislature's latest self-evaluation. Perhaps the most glaring example came from state Sen. Michael Baumgartner, R-Spokane, who, with frat-boy sensibility, tweeted a photo of a bag of salt and a hammer to show what the court could do with its order.

More reasoned responses, however, seem to focus on the specificity and detail contained in the latest order written by Chief Justice Barbara Madsen and signed by seven other justices. For example, actual dollar amounts are given in each of several areas of school funding called out in the 2012 decision. Time after time, Madsen pointed out how much money is needed to meet the court's order and how little the Legislature has actually added so far.

That, said critics, is micromanaging. In his dissent, Justice James Johnson accused his fellow justices of violating constitutional separation of powers. But boiled down, all Madsen does is cite the dollar amounts the Legislature has already called for in bills it has passed and in reports of its own councils and task forces.

Since the Legislature has twice ignored the court's 2012 order that it show a "detailed plan" to get to full funding by 2018, Madsen showed what such a road map might look like, using the Legislature's own numbers.

So it is hardly revolutionary for the court to tell the Legislature and governor to do what they have already promised they would do.

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